TABLE OF CONTENTS

	PAGE
Petition	1
Summary Statement	1
Opinion Below	4
Jurisdiction	4
The Questions Presented	4
Reasons Relied on for Writ of Certiorari	5
Specifications of Error	6
Argument	6
Conclusion	15

TABLE OF CASES

Antelope, The, 10 Wheat. 66, 123	13
Bowles, etc. v. Farmers National Bank of Lebanon, Ky., (C. C. A. 6) 147 F. (2d) 125	5
Cross v. Ryan, 124 F. (2d) 883	9
Estill, etc. v. Fox, 7 T. B. Monroe 552	11
Fleenor v. Hammond, (C. C. A. 6) 116 Fed. (2d) 982	11
Franklin Sugar Refining Co. v. William D. Mullin Co., 7 Fed. (2d) 470	11
Great Altantic & Pacific Tea Co. v. Smith, 281 Ky. 583	8
Humphrey v. U. S. Fidelity & Guaranty Co., (D. C. S. C.) 38 F. Sup. 224	12
Huntington v. Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123	13
Indiana v. Allegheny Oil Co., 85 Fed. 870, 873	13
Indianapolis v. Chase National Bank, 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 47, 54	12
Iowa v. C. B. & Q. R. Co., 37 Fed. 497, 3 L.R.A. 554	13
Jacob v. Clark, 115 Ky. 225	11

TABLE OF CASES—(Continued)

	PAGES
Kresberg v. International Paper Co., (C. C. A. 2) 149 Fed. (2d) 911	12, 14
Louisville & Nashville R. Co. v. Bryant, 200 Ky. 177	9
McLay v. Slade, 48 R. I. 357, 138 Atl. 212	9
Madden v. Commonwealth of Ky., 309 U. S. 83, 60 S. Ct. 406	11
Moore v. Settle, 82 Ky. 187	8
Noland v. Noland, (C. C. A. 9) 111 Fed. (2d) 322	12
Northern Pacific R. Co. v. Meese, 239 U. S. 614, 36 S. Ct. 233, 60 L. Ed. 467	11
Pacolet Mfg. Co. v. Weiss, 194 S. E. 568	13
arker v. Moore, 115 Fed. 799, 802	11
Salonen v. Farley, 82 Fed. Sup. 25	2
Stichtenoth v. Central Grain & Stock Exchange, (C. C. A. 7) 99 Fed. 1	5, 13
United States v. State of Texas, 314 U. S. 480, 62 S. Ct. 350, 86 L. Ed. 356	11
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962, 85 L. Ed. 1416	11
Yellow Cab Trans. Co. v. Louisville Taxicab & Tr. Co., (C. C. A. 6) 147 Fed. (2d) 407, 412	11

TABLE OF RULES, STATUTES AND TEXTS

23 Am. Jur. P. 646, Sec. 56	13
Corpus Juris Secundum, Federal Courts, Sec. 171	11
Judicial Code, Title 28 U. S. C. Sec. 1332	2, 11
Judicial Code, Sec. 240 (a)	4
Judicial Code, Title 28, U. S. C. Sec. 41 (9)	12
Kentucky Revised Statutes, Sec. 372.040	4
Stanton's Revised Statutes of Kentucky, Vol. 1, P. 563, Act of 1854, Sec. 4, Chapter 48	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.....

SAMUEL TUCKER and SAMUEL SCHRADER,
Petitioners,

vs.

MARGARET P. CUTLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONERS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Samuel Tucker, and Samuel Schrader pray that a writ of certiorari issue to review the judgment and order entered October 13, 1950, affirming the judgment and order of the District Court of the United States for the Eastern District of Kentucky, entered on October 6, 1949.

SUMMARY STATEMENT

This case presents an important question of Federal Law and Practice, concerning the jurisdiction of District Court to execute the penal laws of a State, which has not

been, but should be settled by this Court. It involves the interpretation of Title 28, U. S. C. Section 1332, which confers jurisdiction of civil suits upon District Courts of the United States, and the interpretation of a Kentucky Law (372.040 K.R.S.) which authorizes the recovery of treble the amount of gaming losses by a person other than the loser.

This action arises from a Bill of Complaint filed by the Respondent in the Eastern District of Kentucky, seeking to recover from the petitioners a judgment in treble the amount of the alleged gaming losses of her husband to said petitioners, based upon Kentucky Revised Statute 372.040, providing:

> "If the loser or his creditor does not, within six months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, ANY OTHER PERSON may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five years from the delivery or payment."

At or near the time of the filing of Respondent's Bill of Complaint, there were many other suits of a similar nature filed in the same Court, and to which motions to dismiss such Bills of Complaint were filed and overruled by the District Court. Among these cases were the case of *Salonen* v. *Farley*, 82 Fed. Sup. 25, and *Pauline Hartlieb* v. *Edward Carr, et al.*, Civil Action No. 432, not reported. The ruling of the District Court in *Salonen* v. *Farley* (supra) preceded that of the instant case, and formed the basis of the Court's order overruling the Petitioners' motion to dismiss the bill of complaint of the Respondent.

The motion to dismiss the bill of complaint was upon the ground that the District Court had no jurisdiction of

the subject matter of the action because, (1) the Kentucky Statute under which Respondent brought her cause of action is a Statute creating a penalty, and (2) being a penal statute of the Commonwealth of Kentucky, the District Court had no jurisdiction to enforce it, since the courts of one State or sovereignty cannot enforce the penal laws of another state.

The Courts below held that the Kentucky Statute was not penal, but "intended to be remedial and only penal incidentally, or at best described as both penal and remedial", and assumed jurisdiction to enforce the statute as a remedy for a private wrong.

The facts may be simply stated. Margaret P. Cutler, the respondent, and her husband, Joseph Cutler, are residents of the State of Ohio; the petitioners were both residents of the Commonwealth of Kentucky, and the complaint alleges that the husband of the Respondent gambled with, and lost to the respondents various sums of money between April 13, 1947 and June 15, 1948, the total amount of the alleged losses being $32,500.00. The Complaint and Amended Complaint further sets out that neither her husband nor his creditors have sued the Petitioners for the recovery of these alleged losses, upon which Respondent bases her right to recover of them the sum of $97,500.00 (Rec. pp. 1-5). The recovery was limited to the sum of $95,400.00 by direction of the Trial Court, owing to a variance between the pleading and proof (Rec. p. 235).

The defenses of the Petitioners consisted of a general denial, set-off on account of winnings by her husband from the Petitioners, and further plea of collusion between Respondent and her husband for the purpose of re-

covering treble, rather than the actual losses to which her husband would have been limited by law (Rec. pp. 6-7).

The District Court refused to instruct the jury upon the last named defense (Rec. p. 236), and a verdict was returned for the Respondent in the sum of $15,000.00 (Rec. p. 237).

OPINION BELOW

The District Court for the Eastern District of Kentucky filed no opinion. The Court relied upon the former opinion in *Salonen* v. *Farley*, 82 Fed. Sup. 25, (Rec. pp. 14-24) and *Pauline Hartlieb* v. *Edward Carr, et al.*, Civil Action No. 432 (Rec. pp. 11-13), on the docket of that Court, which is not reported. The Sixth Circuit Court of Appeals filed no opinion, but made an order affirming the District Court "for the reasons given by the District Judge" in the cases of *Pauline Hartlieb* v. *Edward Carr, et al.* (supra) and *Salonen* v. *Farley* (supra), which is found at Page 249-250 of the Record, and was entered on October 13, 1950.

JURISDICTION

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240 (a) of the Judicial Code as amended by the Acts of February 13, 1925 (U. S. C., Title 28, Sec. 347).

THE QUESTIONS PRESENTED

The legal questions presented are (1) whether the Kentucky Statute, Kentucky Revised Statutes 372.040, which authorizes the recovery of treble the amount of gaming losses by a person other than the loser, is a statute which imposes a penalty, and therefore a penal statute, which the District Court of the United States has no jurisdiction to enforce; (2) may the District Court, by

construing a State Statute contrary to the construction placed upon it by the highest Court of the State enacting the same, enlarge its jurisdiction beyond the confines of the Congressional enactments limiting such jurisdiction?

REASONS RELIED ON FOR WRIT OF CERTIORARI

The decision of the Court below is without precedent. It decides an important question of Federal Jurisdiction, which has not been, but should be, decided by this Court. The question involves the jurisdiction of the District Court to enforce the penal laws of a "foreign" jurisdiction.

The questions involved are of importance, not only in this case, but in the many cases brought, or to be brought, in the District Courts, which are of a like character. One of the main grounds for the granting of the writ herein is that the Sixth Circuit Court of Appeals has decided an important question of local law in conflict with the applicable decisions of the Court of Appeals of Kentucky, which is without precedent, and of broad general interest throughout Kentucky, and the many other states having similar statutes, which has not been, but should be, decided by this Court.

There is a conflict in the interpretation of U. S. C. Title 28, 1332, by the Sixth Circuit Court of Appeals in the instant case, and that of *Bowles, etc.* v. *Farmers National Bank of Lebanon, Ky.*, 147 (C. C. A. 6th) F. (2d) 125, in which it held the recovery of treble damages for sales of whiskey at prices in excess of ceiling prices, to be a penal action. There is also a conflict between circuits relative to the interpretation of the jurisdiction of District Courts to enforce the penal laws of a foreign jurisdiction, *Stichtenoth* v. *Central Grain & Stock Exchange,* (C. C. A. 7) 99 Fed. 1, which holds directly contra.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court.

2. The Circuit Court of Appeals erred in affirming the ruling of the District Court that the Kentucky Statute under question is remedial, rather than penal, and therefore it had jurisdiction to enforce the same.

3. The Circuit Court of Appeals, and the District Court, erred in construing the Kentucky Statute contrary to the construction placed upon it by the highest Court of Kentucky, and thereby enlarged the jurisdiction of the District Court beyond the confines of the Congressional enactments limiting such jurisdiction.

ARGUMENT

We believe that this is peculiarly a case for the exercise of the power of supervision and review by this Court. It involves a conflict between inferior Courts of a question of jurisdiction of Federal District Courts. This Court alone can settle the question and reconcile the conflict.

The questions are of great general interest and concern. Many states have legislation akin to that under question herein. The exercise of jurisdiction by the Federal Courts of actions to recover gaming losses under State Statutes by third persons, not in privy with either the winner or the loser, has never before been recognized, so far as diligent research discloses. If this jurisdiction is sustained, it will start a flood of litigation into the Federal tribunals of proceedings which have heretofore been recognized as maintainable only in the Courts of the various States.

The judgment of affirmance by the Circuit Court of Appeals is based upon the same reasons and grounds given by the District Court in overruling Petitioners' motion and grounds for a new trial. (R. 249-250). Both Courts adopted the opinion in the case of *Salonen* v. *Farley*, 82 F. Sup. 25, (R. 14-24) and the memorandum of the District Court in the case of Pauline Hartlieb v. Edward Carr, et al., not reported, (R. 11-13), as the basis for sustaining the jurisdiction of the District Court.

We earnestly contend that the construction given this Kentucky Statute is erroneous, and the reasoning of the District Court is not justified by the plain wording of the Kentucky Statute when considered in the light of its historical background, nor is it justified when considered in the light of the interpretation placed upon similar statutes by the Courts of last resort of the several States which have such legislation. Nowhere has diligent research unearthed any opinion which holds this type of statute to be other than penal.

The District Court obviously, in the case of Salonen v. Farley, supra, held the statute to be remedial for two reasons, namely: (a) that the action was brought by the wife of the loser, and, (b) that the recovery of any amount in excess of actual losses is in the nature of punitive damages. Neither position is tenable. Although the action was brought by the wife, her right to do so is not founded upon the marital relationship, nor is anything said in the pleadings about loss of support, and the action could have been brought by any other person in the wide world who first reached the Court House with a petition. This Statute gives the right to recover treble gambling losses TO ANY PERSON, without limit or restriction. In fact, the position of the District Court is

denied in Kentucky by the case of *Moore* v. *Settle,* 82 Ky. 187, where its court of last resort had under consideration this same statute. There a wife of a gaming loser, under the disability of coverture, brought an action contending that this statute, creating a cause of action for ANY OTHER PERSON removed the disability. The Kentucky Court of Appeals, in construing the wording of the Statute, held:

> "The section means, by the words 'any other person', any other person competent to institute the suit. It creates no new cause of action in favor of persons who could not sue. Nor does it relieve any person of disabilities existent at the date of its passage.
>
> "It simply created a new cause of action in favor of such other persons, besides the loser and creditor, as had legal capacity, either in person or by another, to sue".

The second reason is clearly not tenable on the ground that an award of punitive damages can never be made, save as an incident to primary and private injuries sustained by the suitor. The rule is stated in the case of *Great Atlantic and Pacific Tea Co.* v. *Smith,* 281 Ky. 583:

> "Exemplary or punitive damages are generally defined as those given in enhancement of compensatory damages on account of the wanton, malicious or reckless character of the acts complained of, and they go beyond actual damages suffered and are allowed where the tort is aggravated by evil motive, actual malice, or deliberate violence. They are given not by way of a public punishment, but by way of private damages for the wrongful act, as a tort, not a crime. Scott v. Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. Ed. 632; 15 Am. Jur., Damages, Sections 265 and 266, Chiles v. Drake, 59 Ky. 146."
>
> "Their award need bear no relation to the compensatory damages allowed, but only to the injury and its

cause complained of. Louisville & Nashville R. Co. v. Ritchel, 148 Ky. 701."

See also *Louisville & Nashville R. Co.* v. *Bryant*, 200 Ky. 177.

The cases cited by the District Court in support of its interpretation that this is a remedial statute are not analagous.

The lower court seems to have been led astray mainly upon the holding of the case of *Cross* v. *Ryan*, 124 Fed. (2d) 883, which was its main reliance in the Salonen case, supra. We believe, instead, that this case fortifies our position. The act under consideration in that case was the Illinois Dram Shop Act, which specifically gave a cause of action to certain close relatives denominated in the Act, and to no others, which was a cause of action for actual damages sustained by any of them through the injudicious sale of alcoholic beverages to one upon whom one or more of the class were dependent for support. If the Kentucky statute were that type of legislation, and the amount of recovery limited to actual damages,—and the right of recovery was limited to the dependents of the loser, as is the case in the Illinois Dram Shop Act, there would be no question but that the statute would be remedial. But that is not the case. In passing, it might be observed, and the Court well knows that under the common law there was no cause of action for damages for the wrongful death of another. Such causes of action are statutory. The history of the so-called "Death Acts" will show that, at the outset, in many States, the amount of recovery was fixed at Five Thousand Dollars. This was a fixed recovery, and no actual damage was required to be shown. One of the latest cases on this subject is *McLay* v. *Slade*, 48 R. I. 357, 138 Atl. 212 (1927), where

an action was commenced by the representative of a decedent in Rhode Island for a wrongful death which occurred in Massachusetts. In that State, the statute provided for the recovery of a sum of not less than five hundred, nor more than ten thousand dollars, "to be assessed with reference to the degree of his culpability" when death was caused by the wrongful act of another. The Supreme Court of Rhode Island held this statute to be penal, and not enforceable beyond the State of Massachusetts.

> "The purpose of these statutes has remained the same, and the amount of the penalty is based upon exactly the same consideration. Whatever was the nature of the penalty, when recovered upon a criminal proceeding through indictment, remains its nature now when recovered in an action for tort. *This civil form of procedure has been substituted for the criminal for the accomplishment of the same purpose: i.e., for the recovery of a penalty imposed by way of punishment.*"
>
> "*In Hudson* v. *Lynn & B. R. R. Co.*, 185 Mass. 510, 518, 71 N. E. 66, 69, *the court likened the action of tort allowed under the Massachusetts death statutes to the civil action allowed to a common informer for the recovery of a penalty imposed as a punishment, and said that an action under those statutes is of the same kind;* 'the only difference being that the penalty in these actions goes, not to an informer, but to the family of the deceased.' " (Emphasis ours.)

There is a wealth of Federal decisions that those Death Acts were penal and could not be enforced in the Federal Courts. Thereafter many, and as far as we know, all of the States adopted legislation authorizing the recovery of special and provable damages for the wrongful death of another. These acts are generally held to be remediable, and enforceable in the Federal Courts.

This statute has been construed by the Kentucky Court of Appeals to be penal in the cases of *Jacob* v. *Clark,* 115 Ky. 225, and *Estill, etc.,* v. *Fox,* 7 T. B. Monroe, 552. The District Court refused to accept this construction, holding that:

> "While it is true that Federal Courts must follow strictly the State Court decisions, * * * they do not have to accept the language used by the State Courts as actually expressing the true situation."

The Court erred in this position. *Franklin Sugar Refining Co.* v. *William D. Mullin Co.* (D. C. Del.) 7 Fed. (2d) 470; *Northern Pacific Ry. Co.* v. *Meese,* 239 U. S. 614, 36 S. Ct. 233, 60 L. Ed. 467; *Corpus Juris Secundum, Federal Courts, Section 171, pages 1247-1248; Watson* v. *Buck,* (Fla.) 313 U. S. 387, 61 S. Ct. 962, 85 L. Ed. 1416; *United States* v. *State of Texas,* 314 U. S. 480, 62 S. Ct. 350, 86 L. Ed. 356; *Parker* v. *Moore,* 115 Fed. 799, 802; *Madden* v. *Commonwealth of Kentucky,* 309 U. S. 83, 60 S. Ct. 406; *Fleenor* v. *Hammond,* (C. C. A. 6) 116 F. (2d) 892, 985; *Yellow Cab Trans. Co.* v. *Louisville Taxicab & Tr. Co.,* (C. C. A. 6) 147 F. (2d) 407, 412.

Indeed, the most persuasive reason the Kentucky Court of Appeals found in holding the Act to be penal in Jacob v. Clark is quoted as follows:

> "The action here allowed is in the nature of a penalty for a violation of the law; OTHERWISE THE LEGISLATURE WOULD HAVE NO CONSTITUTIONAL POWER TO ENACT THE STATUTE WHICH AUTHORIZES IT."

It has been universally held that the District Courts have only such jurisdiction as is expressly conferred by Congressional enactment. Title 28 U. S. C. Section 1332,

provides that the District Courts shall have original jurisdiction:

> "of all civil suits where the matter in controversy exceeds the sum of three thousand dollars, exclusive of interest and costs, and is between (1) citizens of different states:"

The District Court adopted the view that a more liberal construction of the jurisdictional statute should be given because the Federal Tribunal considering the question was located within the enacting state. The jurisdiction of Federal District Courts cannot be enlarged except by new enactment. It must apply to all District Courts alike, regardless of the place of holding Court. *Noland v. Noland,* (C. C. A. 9) 111 Fed. (2d) 322; *Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 86 L. Ed. 47, 54, 62 S. Ct. 15; *Humphrey* v. *U. S. Fidelity & Guaranty Co.* (D. C. S. C.) 38 Fed. Sup. 224; *Kresberg* v. *International Paper Co.,* (C. C. A. 2) 149 Fed. (2d) 911.

The Kentucky Legislature enacted this Statute as a penal law; the Kentucky Court of Appeals has construed it to be such; and the Congress of the United States has limited the jurisdiction of Federal Courts in the enforcement of penal statutes, to:

> "suits and proceedings for the enforcement of penalties and forfeitures incurred under *any law of the United States.*" 28 U. S. C. Sec. 41 (9).

If Congress had intended the Federal Courts to enforce the penal statutes of the several states, it would have said so. The effect of the judgments and opinions below is to enlarge the jurisdiction of District Courts beyond that to which it is limited by law.

"It is a universally accepted rule of law that penal statutes will not be recognized or enforced in jurisdictions other than those in which they are enacted. The penal laws of one state can have no operation in another state, and furthermore, the state will not give effect to such penal legislation of another state." 23 Am. Jur. p. 646, Sect. 56. This rule is settled in the cases of *Huntington* v. *Attrill,* 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123; *The Antelope,* 10 Wheat. 66, 123; *Stichtenoth* v. *Central Stock & Grain Exchange,* 99 Fed. 1; *Iowa* v. *C. B. & Q. R. Compan,* 37 Fed. 497, 3 LRA 554; *Pacolet Mfg. Company* v. *Weiss,* 194 S. E. 568, and many other cases too numerous to mention.

This rule has been held to apply as between the states and the federal courts. *Indiana* v. *Allegheny Oil Company,* 85 Fed. 870, 873:

> "The penal laws of the several states of the United States are regarded, so far as the jurisdiction of the courts of the United States are concerned, as laws of a foreign country."

Historically, this legislation has been on the Statute books of Kentucky since it became a State, having come to it from the Statutes of Virginia. It has been adopted and re-adopted throughout the years, being changed only in the ultimate beneficiary of the recovery. At various times, such recovery, by "popular action", was payable to the common school fund—the county tax fund—partially to the suitor and partially to some other public use. The Act of 1854, which is Section 4 of Chapter 48, R. H. Stanton's Revised Statutes of Kentucky, Vol. 1, p. 563, provided that the recovery should be "one half for the person suing, and the other half for the Commonwealth". All of these enactments were part of the general laws for

the suppression of gaming, and so appear in the published Statutes until re-titled and separated, not by the Legislature, but by codifiers of the laws. Identical, or at least substantially comparable Statutes have been enacted by many of the States of the Union, and have always been considered judicially by the Courts of such States as creating a penalty. Nowhere, in any of the Statutes is there a provision allowing recovery of more than the actual losses, is there any language which suggests that the enacting authority gave any consideration to providing a remedy to dependents. By the process of logical reasoning, if the instant action had been brought by some person other than the *wife* of the alleged loser, the foundation of the decision is washed away, and the Court could not have held the Statute to be remedial.

The question here is not whether the wife or dependent of a profligate husband has been damaged by his gaming losses. It is "the wholly different one of the jurisdiction of a federal court over the subject matter of a particular action, and effect must be given to the well-established rule that federal jurisdiction is not to be extended beyond the scope permitted by a strict construction of the statute upon which it rests." *Kresburg* v. *International Paper Company*, (2nd cir.) 149 Fed. 2nd. 911. In that case, Judge Chase, writing for the Court, said:

> "If and when Congress desires to have the term "a corporation" in the Judicial Code include an association like the Massachusetts trust in this case, a simple amendment is all that will be required. Meanwhile it is not for us to undertake to enlarge by construction an exception in a statute restricting federal jurisdiction."

CONCLUSION

This Court has not heretofore had the question at bar directly presented, and we respectfully pray that the Petition for a writ of certiorari be granted.

DANIEL W. DAVIES,
THOS. D. HIRSCHFELD,
Attorneys for Petitioners.

FILED
FEB 1 1951

In The

Supreme Court of the United States

October Term, 1950.

No. 482

SAMUEL TUCKER and SAMUEL SCHRADER,
Petitioners,

vs.

MARGARET P. CUTLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

HENRY J. COOK,
CARL H. EBERT,
WALTER J. BURKE,
Counsel for Respondent.

COURT INDEX PRESS, INC. - LAW PRINTERS - CINCINNATI, OHIO

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement of Case	3
Argument	3
I There Is No Important Question Of Federal Law	3
II There Is No Conflict Of Decisions	4
III The Decision Of The Court Below Is Clearly Correct	8
Conclusion	11

TABLE OF CASES

	Page
Bowles, Etc. v. Farmers National Bank of Lebanon, Ky., 147 F. (2d) 425	4
Cross v. Ryan, 124 Fed. (2d) 883	9
Estill, Etc. v. Fox, 7 T. B. Monroe 552	7
Farless v. Morehead, 201 Fed. 310	8
Huntington v. Attril, 146 U.S. 657-685, 36 L. Ed. 1123	5
Jacobs v. Clark, 115 Ky. 255	7
Martin v. Wheatly, 62 F. Supp. 104	8
Milwaukee County v. White, 296 U. S. 268 - 270, 56 S. Ct. 229 - 231, 80 L. Ed. 220.	9
Moore v. Settle, 82 Ky. 187	7
Salonen v. Farley et al., 82 Fed. Supp. 25	9
Schick v. United States, 195 U. S. 68, 49 L. Ed. 99	7
Stichtenoth v. Central Grain and Stock Exchange, 99 Fed. 1	4

TABLE OF STATUTES AND TEXTS

23 Am. Jur. PP 648, 649	5
Judicial Code, Title 28 U.S.C. Section 1332 (a)(1)	2
Kentucky Revised Statutes, Section 372.020	2
Kentucky Revised Statutes, Section 372.040	2
31 Words & Phrases, Perm. Ed. 586	10

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1950.

No. 482

SAMUEL TUCKER and SAMUEL SCHRADER,
Petitioners,

vs.

MARGARET P. CUTLER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit did not render an opinion in this case, but its judgment (R. 249-250) affirmed the District Court for the reasons set out in the opinions of the District Court in the cases of *Salonen* v. *Farley, et al.*, 82 Fed. Supp. 25 (R. 14-24) and *Pauline Hartlieb* v. *Edward Carr et al.*, (Unreported) (R. 11-13).

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1950 (R. 249-250). No petition for rehearing

was filed. The jurisdiction of this court is sought to be invoked by petitioners under Title 28 U.S.C. Section 1254 (1), although petitioners have through inadvertence set out a section of the Code no longer in force and effect.

QUESTION PRESENTED

The only question presented is whether Kentucky Revised Statutes, Section 372.040, which authorizes the recovery of treble the amount of gaming losses by a person other than the loser, is a statute which is strictly penal in its nature and one which has no extraterritorial effect.

STATUTES INVOLVED

Judicial Code, Title 28 U.S.C. Section 1332 (a) (1):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and cost, and is between: (1) citizens of different states;

Kentucky Revised Statutes, Section 372.020 (In part):

> If any person loses to another at one time, or within 24 hours, $5.00 or more, or anything of that value, and pays, transfers or delivers it, the loser or any of his creditors may recover it, or its value, from the winner, or any transferee of the winner, having notice of the consideration, by action brought within 5 years after the payment, transfer or delivery.

Kentucky Revised Statutes, Section 372.040:

> If the loser or his creditor does not, within 6 months after its payment or delivery to the win-

ner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within 5 years from the delivery or payment.

STATEMENT OF CASE

The statement of the case as set out in the petition at PP 2-4 is considered substantially correct by respondent.

ARGUMENT

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

This case is not one in which a petition for writ of certiorari should be granted. The question involved herein is of little or no importance except to petitioners and other gambling house operators in this and other states wherein gambling is unlawful and in which similar statutory provisions are in effect in reference to the recovery of gambling losses.

Petitioners' sole statement relating to the importance of the questions involved is set out in these words in the Petition at page 5:

> "The questions involved are of importance, not only in this case, but in the many cases brought or to be brought, in the District Courts, which are of a like character."
> "* * * and of broad general interest throughout Kentucky, and the many other states having similar statutes, * * *".

This case would not be in the courts today if petitioners had not been operating an unlawful gambling establishment and there will never be any other cases of this nature in the courts in the future if petitioners and others operating the same type of business cease violating the law of the state in which their unlawful gambling operations are carried on.

II

THERE IS NO CONFLICT OF DECISION

Petitioners claim that there is a conflict in the interpretation of Section 1332, Title 28, U.S.C., by the Court of Appeals for the Sixth Circuit in the instant case and that of *Bowles, etc.* v. *Farmers National Bank of Lebanon, Kentucky,* 147 F. (2d) 425.

They also claim that the Court of Appeals for the Sixth Circuit has decided an important question of local law in conflict with the applicable decisions of the Court of Appeals of Kentucky.

Petitioners also claim that there is a conflict between circuits on this question of jurisdiction and cite *Stichtenoth* v. *Central Grain and Stock Exchange,* 99 Fed. 1.

With these contentions of petitioners we heartily disagree. If there is a conflict it is not a direct conflict but merely an inconsistency in the general principles utilized. There is a wealth of cases deciding whether a case is penal for the purpose of applying statutes of limitation, and deciding whether a statute should be construed strictly or liberally, but THOSE CASES DO NOT DECIDE THE QUESTION OF THE EXTRATERRITORIAL OPERATION OF A STATE LAW. The question raised here is whether Section 372.040 Kentucky Revised Statutes is

penal or remedial in its operation FOR THE PURPOSE OF DETERMINING ITS EXTRATERRITORIAL EFFECT. If it is penal in that sense it has no extraterritorial effect. If it is remedial in that sense the federal courts and the courts of sister states would have jurisdiction of an action brought for the recovery of gaming losses under that statute.

In 23 Am. Jur. PP 648, 649 it is said:

> "The question whether a statute as interpreted by the courts of the state enacting it is penal in such sense as to deny it all extraterritorial operation is not one of local, but of general or international law * * *. *'The court of the forum determines whether a statute is penal in its nature, so as to prevent its enforcement in such foreign jurisdiction,* * * *". (Italics ours)

This court applied the same rule in *Huntington* v. *Attril,* 146 U. S. 657-689, 36 L. Ed. 1123, wherein it was said:

> "The test is not by what name the statute is called by the Legislature or the courts of the State in which it was passed, but whether it appears to *the tribunal which is called upon to enforce it* to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person." (Italics ours)

Inasmuch as this is an international rule of law, the courts of Kentucky could never have been called upon to rule upon the extraterritorial effect of any Kentucky statute. That question must be determined only by the law of the forum.

The case at bar and the *Bowles case, supra,* are as far apart as the poles, not only as to the facts but likewise as

to the precise points of law determined. In the *Bowles case,* which was one filed by the O.P.A. Administrator under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix Section 925 (e) , to recover treble damages for sales exceeding the ceiling price on a quantity of whiskey the court held the act was penal for the purpose of deciding that an action for damages by the administrator did not survive the death of the one charged with the violation.

In the *Stichtenoth case, supra,* we believe, that the court arrived at the correct decision. It is obvious however, that the court lost sight of its goal in writing its opinion. It was a pure and simple qui tam action and the court needed go no further when it saw that one-half of the recovery was for the benefit of the county and one-half for the benefit of the plaintiff. But it did go further and with this OBITER DICTUM we disagree.

The case at bar is not a qui tam action. It was not filed in the name of the state and the damages prayed for are not divided between the state and a common informer. The statute in question says "any other person". In the case at bar the "any other person" is the wife of the loser who was entitled to support from her husband who lost all of his assets gambling in the establishment of petitioners. This action was filed in the wife's name individually. All of the judgment recovered in the lower court goes exclusively to respondent.

The federal courts have frequently established the definition of "penal laws" for the purpose of deciding whether the law in question has extraterritorial effect, as those imposing a pecuniary or personal punishment by the state and which are SUBJECT TO THE PARDON POWER OF THE EXECUTIVE AUTHORITY.

This court propounded the following rule in *Schick* v. *United States,* 195 U.S. 68, 49 L. Ed. 99:

> "'* * * Penal laws, strictly and properly are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, *the executive of the state has the power to pardon*'." (Italics ours)

Contrary to the contention of petitioners the District Court did not construe a state statute contrary to the construction placed upon it by the highest court of the state enacting the same. All of the cases cited by petitioners wherein this statute was held to be penal by the Court of Appeals of Kentucky are of no avail to petitioners as authority to support their contention.

Moore v. *Settle,* 82 Ky. 187 cited by petitioners was an action brought in the Kentucky courts by the wife of a loser prior to the Weisinger Act and therefore the wife was under the disability of coverture and could not bring any action in her own name. The Court of Appeals in that case only held that Section 372.040 Kentucky Revised Statutes did not remove this disability.

In the case of *Estill, etc.* v. *Fox,* 7 T. B. Monroe, 552 the court held that the act in force at that time was a penal act but at that time the act authorized a qui tam action and was the law in effect prior to the enactment of Section 372.040 Kentucky Revised Statutes. In that case the decision was made for the purpose of deciding which statute of limitation would apply to the suit then pending.

They also cite the case of *Jacobs* v. *Clark,* 115 Ky. 255. The court in that case decided that the statute in question was penal but only for the purpose of deciding the question of whether the act should be strictly or liberally construed.

As we have said before in this brief, the courts of Kentucky could never have been nor can they ever be called

upon to decide the extraterritorial effect of any of its own statutes. That is a question of international law which must be decided by the court of the forum.

Petitioners claim that the District Court was bound to follow the decisions of the highest court in Kentucky and the construction placed on the statute in question by that court. They further claim that by failing to do so the District Court enlarged its jurisdiction beyond that granted by Congressional enactments. The Rules of Decisions Act was not enacted to reduce the jurisdiction of a Federal Court below that of the courts of the states in which the particular federal court is sitting. It was enacted to assure the application of the same rules of law in federal and state courts sitting side by side in the state, so that the result reached in a given case would not depend upon where the suit happened to be brought. This has been the generally accepted and broadly stated test for the application of the Erie Doctrine — That in a particular case a Federal Court should reach substantially the same result as would a court of the state in which the federal court is sitting. The goal sought is the equal administration of justice.

III

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT

The decision of the court below is not without precedent and the question of federal jurisdiction involved has been decided by federal courts in many cases.

The lower court retained jurisdiction in the case of *Farless* v. *Morehead,* 201 Fed. 310 which was a suit filed under the Ohio gambling loss statute.

Martin v. *Wheatly,* 62 F. Supp. 104, decided in 1945 was another case wherein it was decided that a claim for relief

under the Arkansas gaming statute was a civil action at law and could therefore be maintained in the federal courts.

Section 372.040 Kentucky Revised Statutes is essentially a remedial statute and therefore the District Court had jurisdiction to hear and decide the case at bar.

The District Court in deciding this identical question in *Salonen* v. *Farley,* 82 Fed. Supp. 25 (R. 14-24) said in its opinion:

> "The statute here involved creates a right of action in a private person and provides for a recovery of treble the amount of recovery lost to the defendant in a gambling transaction. This is in the nature of punitive damages but from which the state derives nothing except the hope that it will deter a violation of one of its criminal laws."
>
> "I am convinced that the statute was intended to be remedial and only penal incidentally. * * * A statute can be both. See Collins, et al v. Kidd, et al, 38 F. Supp. 634, * * *"

In *Milwaukee County* v. *White,* 296 U.S. 268-270, 56 S. Ct. 229-231, 80 L. Ed. 220 Mr. Justice Stone, speaking for the court said:

> "In this grant of jurisdiction of causes arising under state as well as federal law the phrase 'suits of a civil nature' is used in contradistinction to 'crimes and offenses.' "

The case at bar was brought to recover under the cause of action given by the statute and is a suit to vindicate a private right as distinguished from punishment in a criminal action and therefore passes the test as set out in *Milwaukee County* v. *White Company, supra.*

The case of *Cross* v. *Ryan,* 124 Fed. (2d) 883 further fortifies the lower court's decision to retain jurisdiction of this case. It was an action by a Kentucky widow for dam-

ages in behalf of her minor children and herself for the death of the husband in a drunken brawl allegedly caused by the defendant's selling too much liquor to the husband in violation of the so-called Dram Shop Act of Illinois. The defense contended that the action was of such a penal nature as to preclude federal jurisdiction. The court said:

> "In the case at bar, there is nothing of a criminal nature about the suit. The state has no interest in the recovery or the proceeds thereof. The fact that the recovery of damages under this section may help the state in its policy to regulate the sale of intoxicating liquor, does not make a suit to recover the damages a suit in its nature other than a civil suit."

In 31 Words & Phrases, Perm. Ed. 586, there is the following quotation ascribed to the *Huntington* v. *Attril* case, *supra*, and the citations thereunder:

> "Penal laws, strictly and properly are those imposing punishment for an offense committed against the state, and which by the English and American constitutions, *the executive of a state has the power to pardon*. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases neither the liability imposed, nor the remedy given, is strictly penal. Huntington v. Attril, 13 S. Ct. 224, 227 146 U.S. 657, 36 L. Ed. 1123; Kilton v. Providence Tool Company, 48 A. 1039, 1042, 22 R. I. 605; Ailsworth v. Curtis, 34 A. 1109, 1111, 19 R. I. 517, 33 L.R.A. 110, 61 Am. St. Rep. 785; American Credit-Indemnity Company v. Ellis, 59 N. E. 679, 682, 156 Ind. 212; Hutchison v. Yung, 80 N.Y.S. 259, 261, 80 App. Div. 246; People v. Wells, 65 N.Y.S. 319, 323, 52 App. Div. 583; Manhatten Trust Company v. Davis, 58 P. 718, 720, 23 Mont. 273; Plum v. Griffin, 50 A. 1,

> 2, 74 Conn. 132; Leavy v. Superior Court of City and County of San Francisco, 38 P. 965, 966, 105 Cal. 600, 29 L.R.A. 811." (Italics ours)

We have no quarrel with the fundamental principle expounded by petitioners to the effect that the courts of one state will not execute the penal laws of another. The District Court in *Salonen* v. *Farley et al, supra* (R. 14-24) said:

> "There is no controversy as to the law applicable to this case. The real question to be determined is whether or not the statute is a penal statute within the meaning of the rule of law or is it a remedial statute."

With this statement we agree.

Petitioners again bring up the so-called death act cases as they did in the lower court. We can see no connection between those cases and the case at bar. Petitioners admit that the present death acts are remedial. The Kentucky statute here involved does not call for a lump sum recovery but a recovery based upon the losses sustained. That portion over and above the actual losses is considered as punitive damages and cases involving punitive damages have always been held to be remedial.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY J. COOK,
CARL H. EBERT,
WALTER J. BURKE,
Counsel for Respondent.